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7 UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA, ) CRIM. CASE NO. 08CR1165-JM  
12 ) Plaintiff, ) DATE: May 16, 2008  
13 ) ) TIME: 11:00 a.m.  
14 ROBERTO TORRES-HERNANDEZ (1),) Before Honorable Jeffrey T. Miller  
15 aka GREGORIO CRUZ-MERINO,) GOVERNMENT'S RESPONSE IN OPPOSITION TO  
16 MIGUEL MERINO-CALVERO (2),) DEFENDANT TORRES-HERNANDEZ' MOTION  
17 ) Defendants.) TO:  
18 ) ) (1) COMPEL DISCOVERY  
 ) ) (2) PRESERVE AND INSPECT EVIDENCE;  
 ) ) AND  
 ) ) (3) GRANT LEAVE TO FILE FURTHER  
 ) ) MOTIONS.

20 COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,  
21 KAREN P. HEWITT, United States Attorney, and Luella M. Caldito, Assistant United States  
22 Attorney, and hereby files hereby files its Response in Opposition to defendant Roberto Torres-  
23 Hernandez' above-referenced Motions. This Response is based upon the files and records of this case.

I

## STATEMENT OF THE CASE

26 On April 15, 2008, a federal grand jury in the Southern District of California returned a six  
27 count Indictment charging defendants Roberto Torres-Hernandez and Miguel Merino-Calvero with  
28 three counts of bringing in illegal aliens for financial gain and aiding and abetting, in violation of Title  
8, United States Code, Section 1324 (a)(2)(B)(ii) and Title 18, United States Code, Section 2 and three

1 counts of transporting and moving illegal aliens within the United States and aiding and abetting, in  
2 violation of Title 8, United States Code, Sections 1324(a)(1)(A)(ii) and (v)(II). Defendants were  
3 arraigned on the Indictment on April 15, 2007 and pleaded not guilty to the Indictment.

4 **II**

5 **STATEMENT OF FACTS**

6 **A. The Smuggling Offense**

7 On March 27, 2008, agents in the San Diego Sector Smuggling Interdiction Group (SIG) were  
8 performing anti-smuggling duties near the State Route 94 checkpoint. The agents were working in  
9 plain clothes and unmarked vehicles. At approximately 7:40 a.m., SIG Agent E. Penagos observed a  
10 black Chevrolet Tahoe (“the vehicle”) traveling eastbound on Japatul Valley Road in Jamul, California.  
11 Agent Penagos followed the vehicle as it made a right turn onto Lyons Valley Road. The subject  
12 vehicle then made a right turn onto Spirit Trail Road, which is a common loading spot utilized by alien  
13 smuggling organizations to pick up illegal aliens after circumventing the State Route 94 checkpoint.  
14 This area is approximately 8 miles west of the Tecate, California Port of Entry and 9 miles north of the  
15 international boundary between the United States and Mexico.

16 After Agent Penagos observed the vehicle make a right turn on Spirit Valley Road, Agent  
17 Penagos positioned his vehicle on Lyons Valley Road in order to observe any vehicles exiting from  
18 Spirit Valley Road. At approximately 7:55 a.m., the subject vehicle returned to the intersection of  
19 Spirit Trail and Lyons Valley Road and then made a left turn back on Lyons Valley Road. As Agent  
20 Penagos followed the vehicle, he observed that the vehicle was bouncing heavily in the rear. Agent  
21 Penagos then requested record checks on the vehicle. The record checks revealed the registered owner  
22 as Gregorio Cruz of 305 Franciscan Way in Oceanside, California.

23 SIG agents then requested the assistance of a marked border patrol unit to conduct a vehicle  
24 stop. Agent Miranda responded to the request. At approximately 8:30 a.m., Agent Miranda attempted  
25 a vehicle stop by activating his emergency lights and sirens while the vehicle was traveling on  
26 Interstate 8. The subject vehicle failed to yield to Agent Miranda. Agent Miranda continued to follow  
27 the vehicle for approximately one mile before the pursuit was terminated.

28

1 SIG agents continued their surveillance and observed the vehicle weaving in and out of traffic  
2 on Interstate 8 for several miles before heading north on Highway 125. The vehicle then took Highway  
3 52 westbound and then traveled north on Interstate 15. On Interstate 15, the vehicle continued to  
4 weave in and out of traffic. On several occasions, the subject vehicle almost sideswiped other vehicles  
5 that were traveling on Interstate 15.

6 The subject vehicle then exited interstate at Old Highway 395, which is a common route used  
7 by alien smugglers to circumvent the Temecula Checkpoint. As the vehicle exited on Old Highway  
8 395, it began to slow its speed. At that point, Agent Penagos deployed a Controlled Tire Deflation  
9 Device (CTDD), which was successful in deflating the right front tire of the vehicle.

10 Defendant Roberto Torres-Hernandez was the driver of the vehicle. Defendant Merino-Calvero  
11 was the front seat passenger of the vehicle. When agents approached the vehicle, they observed  
12 defendant Merino-Calvero in the passenger seat, lying with his seat completely back. Three other  
13 individuals were found in the back of the vehicle attempting to conceal themselves from the agents.  
14 The agents identified themselves and questioned all the occupants as to their immigration status. All  
15 the individuals admitted to being citizens and nationals of Mexico without proper immigration  
16 documents to allow them to enter or remain in the United States.

17 **1. Defendant Torres-Hernandez' Statement of the Offense**

18 At approximately 2:42 p.m., defendant Torres-Hernandez was advised of his Miranda rights,  
19 which he acknowledged and waived. Torres-Hernandez again stated that he was a citizen of Mexico  
20 without any immigration documents.

21 Defendant Torres-Hernandez stated that an unknown male approached him at a market in  
22 Oceanside, California and convinced him to smuggle illegal aliens into the United States. Defendant  
23 Torres-Hernandez admitted that he was to be paid \$1000 after smuggling the illegal aliens to Los  
24 Angeles, California.

25 Defendant Torres-Hernandez further claimed that the unknown male called him and told him  
26 it was time to pick up the aliens. Torres-Hernandez also made contact with the foot guide, via cell  
27 phone. The foot guide also informed defendant Torres-Hernandez that they were ready to be picked  
28 up. Defendant Torres-Hernandez also admitted that he used his own personal vehicle to smuggle the

1 illegal aliens. Lastly, defendant Torres-Hernandez also identified defendant Miguel Merino-Calvero  
2 as the foot guide.

3 **2. Defendant Merino-Calvero's Statement of the Offense**

4 At approximately 6:48 p.m., defendant Merino-Calvero was advised of his Miranda rights,  
5 which he acknowledged and waived. Defendant Merino-Calvero again stated that he was a citizen of  
6 Mexico without any immigration documents.

7 Defendant Merino-Calvero claimed that he crossed into the United States from Mexico the  
8 previous day with eight other individuals. Defendant Merino-Calvero further claimed that after the  
9 group had crossed into the United States, the foot guide left him and four other individuals. Defendant  
10 and the four other individuals continued their journey and eventually joined another group led by a  
11 different foot guide. Once they were outside Alpine, California, the foot guide left defendant Merino-  
12 Calvero and the four other individuals behind. Defendant Merino-Calvero claimed that he called his  
13 friend Inocensio in Oceanside, California and asked to be picked up. After he made the phone call, a  
14 black truck arrived and picked them up. According to defendant Merino-Calvero, the driver of the  
15 truck instructed Merino-Calvero to sit in the front passenger seat.

16 Defendant Merino-Calvero claimed that he never met the driver of the load vehicle and that he  
17 had never spoken to the driver on the phone. When the agents confronted defendant Merino-Calvero  
18 that there were numerous phone calls between his cell phone and defendant Torres-Hernandez' cell  
19 phone, defendant Merino-Calvero stated that the driver was bringing him some money to pay his  
20 smuggling fee. Lastly, defendant Merino-Calvero identified defendant Torres-Hernandez as the driver  
21 of the vehicle.

22 **3. Material Witnesses' Statements**

23 The three illegal aliens in the back of the vehicle were retained as material witnesses –Agustin  
24 Cavero-Ortiz, Donaciano Ramirez-Merino and Silverino Ramirez-Mejia. Each provided a videotaped  
25 statement, in which they admitted to being citizens and nationals of Mexico with no legal right to enter  
26 or reside in the United States. Cavero-Ortiz stated that he was going to pay \$1200 to be smuggled to  
27 San Diego, California. Ramirez-Merino stated that he was going to pay \$1000 to be smuggled to  
28 Greenfield, California. Ramirez-Mejia was going to pay an unknown amount to be smuggled into the

1 United States. All three individuals identified defendant Torres-Hernandez as the driver of the vehicle  
 2 that picked them up and defendant Merino-Calvero as their foot guide.

3 **III**

4 **ARGUMENT**

5 **A. Motion to Compel Discovery**

6 The United States has and will continue to fully comply with its discovery obligations. To date,  
 7 the United States has produced 130 pages of discovery to defendants' counsel including a DVD  
 8 containing the defendants' post-arrest statements and the statements of the material witnesses. As of  
 9 today, the United States has received no reciprocal discovery. Counsel believes that all discovery  
 10 disputes can be resolved amicably and informally in this case. In view of the below-stated position of  
 11 the United States concerning discovery, it is respectfully requested that no orders compelling specific  
 12 discovery by the United States be made at this time. The Government has no objection to the  
 13 preservation of evidence for a reasonable time period.

14 1. **Defendant's Statements**

15 The United States recognizes its obligation under Federal Rules of Criminal Procedure  
 16 ("Rules") 16(a)(1)(A) and 16(a)(1)(B) to provide to Defendant any written statements and the  
 17 substance of Defendant's oral statements. The United States has produced all of Defendant's  
 18 statements that are known to the undersigned Assistant U.S. Attorney at this time. If the United States  
 19 discovers additional oral or written statements that require disclosure under the relevant Rules, such  
 20 statements will be promptly provided to Defendant.

21 2. **Defendant's Prior Record**

22 The United States has provided Defendant with a copy of Defendant's known prior criminal  
 23 record under Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir.  
 24 1990). Should the United States determine that there are any additional documents pertaining to  
 25 Defendant's prior criminal record, those will be promptly provided to Defendant.

26 3. **Arrest Reports, Notes, Dispatch Tapes**

27 The United States does not object to the request for arrest reports and has already produced to  
 28 Defendant all arrest reports known to the United States at this time.

1       The United States has no objection to the preservation of the handwritten notes taken by any  
2 of the Government's agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir.  
3 1976) (agents must preserve their original notes of interviews of an accused or prospective government  
4 witnesses). However, the United States objects to providing Defendant with a copy of any rough notes  
5 at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes where the content of those  
6 notes have been accurately reflected in a type-written report. See United States v. Brown, 303 F.3d  
7 582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A)  
8 does not require disclosure of an agent's notes even where there are "minor discrepancies" between  
9 the notes and a report). The Government is not required to produce rough notes pursuant to the Jencks  
10 Act, because the notes do not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes  
11 (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved  
12 or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough  
13 notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States  
14 v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks  
15 Act where notes were scattered and all the information contained in the notes was available in other  
16 forms). The notes are not Brady material because the notes do not present any material exculpatory  
17 information, or any evidence favorable to Defendant that is material to guilt or punishment. Brown,  
18 303 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to  
19 the defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71  
20 (3d Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient).  
21 If, during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the  
22 Jencks Act, or Brady, the notes in question will be provided to Defendant.

23       The United States is unaware of a dispatch tape related to this case at this time.

24       4.       Documents and Tangible Objects

25       The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing  
26 Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that  
27 are within its possession, custody, or control, and that is either material to the preparation of  
28 Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at

1 trial, or was obtained from or belongs to Defendant. The United States, however, need not produce  
2 rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

3       5.     Reports of Scientific Tests or Examinations

4       Defendant requests the results of any scientific or other tests or examinations in connection  
5 with this case. The United States will disclose to Defendant the name, qualifications, and a written  
6 summary of testimony of any expert the United States intends to use during its case-in-chief at trial  
7 pursuant to Fed. R. Evid. 702, 703, or 705.

8       6.     Expert Witnesses

9       The United States will comply with Rule 16(a)(1)(G) and provide Defendant with a written  
10 summary of any expert testimony that the United States intends to use during its case-in-chief at trial  
11 under Federal Rules of Evidence 702, 703 or 705.

12       7.     Brady Material

13       The United States is well aware of and will continue to perform its duty under Brady v.  
14 Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory  
15 evidence within its possession that is material to the issue of guilt or punishment. Defendant, however,  
16 is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused,  
17 or which pertains to the credibility of the United States' case. As stated in United States v. Gardner,  
18 611 F.2d 770 (9th Cir. 1980), it must be noted that "the prosecution does not have a constitutional duty  
19 to disclose every bit of information that might affect the jury's decision; it need only disclose  
20 information favorable to the defense that meets the appropriate standard of materiality." Id. at 774-775  
21 (citation omitted).

22       The United States will turn over evidence within its possession which could be used to properly  
23 impeach a witness who has been called to testify.

24       Although the United States will provide conviction records, if any, which could be used to  
25 impeach a witness, the United States is under no obligation to turn over the criminal records of all  
26 witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such  
27 information, disclosure need only extend to witnesses the United States intends to call in its case-in-  
28

1 chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d  
2 1305, 1309 (9th Cir. 1979).

3 Finally, the United States will continue to comply with its obligations pursuant to United States  
4 v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

5 The Government already produced a DVD recording of the material witnesses statements.  
6 Although the Government does not object to the preservation of any rough notes taken by the  
7 interviewing agents, the Government does object to the production of the rough notes at this time.

8 8. Request for Preservation of Evidence

9 The United States will preserve all evidence to which the Defendants are entitled pursuant to  
10 the relevant discovery rules. The United States also has no opposition to a preservation order, should  
11 Defendant seek one from this Court.

12 9. Any Proposed 404(b) Evidence

13 The United States will disclose, in advance of trial, the general nature of any “other bad acts”  
14 evidence that the United States intends to introduce at trial pursuant to Federal Rule of Evidence  
15 404(b).

16 10. Witness Addresses

17 The United States objects to this request as overbroad, unnecessary, and unsupported. Through  
18 discovery, Defendant has the names of the officers and agents involved in her arrest. In addition, the  
19 United States will provided Defendant with a list of witnesses it intends to call in its trial memorandum.  
20 The United States objects to the request for the name and address of witnesses who will not be called  
21 by the Government at trial as overbroad and irrelevant.

22 11. Jencks Act Material

23 The United States will comply with its discovery obligations under the Jencks Act, Title 18,  
24 United States Code, Section 3500, and as incorporated in Rule 26.2.

25 12. Informants and Cooperating Witnesses

26 At this time, the United States is not aware of any confidential informants or cooperating  
27 witnesses involved in this case. The Government must generally disclose the identity of informants  
28 where: (1) the informant is a material witness, and (2) the informant’s testimony is crucial to the

1 defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved  
2 in this case, the Court may, in some circumstances, be required to conduct an in camera inspection to  
3 determine whether disclosure of the informant's identity is required under Roviaro. See United States  
4 v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines that there is  
5 a confidential informant or cooperating witness who is a material witness with evidence helpful to the  
6 defense or essential to a fair determination in this case, the United States will either disclose the  
7 identity of the informant or submit the informant's identity to the Court for an in camera inspection.

### 13. Residual Request

9 The United States has complied with Defendant's residual request for prompt compliance with  
10 Defendant's discovery requests and will continue to do so.

## **B. Preservation Order**

12 As stated above, the United States will preserve all evidence to which the defendants are  
13 entitled pursuant to the relevant discovery rules.

**C. Motion for Leave to File Further Motions**

15 The Government opposes this request unless the motion is based upon newly discovered  
16 evidence not available to Defendant at the time of the motion hearing.

## IV

19 For the foregoing reasons, the United States requests that Defendant's Motions be denied where  
20 opposed.

22 || DATED: May 9, 2008

Respectfully Submitted,

KAREN P. HEWITT  
United States Attorney

/s/ Luella M. Caldito

LUELLA M. CALDITO  
Assistant U.S. Attorney

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**IT IS HEREBY CERTIFIED THAT:**

I, LUILLA M. CALDITO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT TORRES-HERNANDEZ'S MOTION TO (1) COMPEL DISCOVERY; (2) PRESERVE EVIDENCE AND (3) GRANT LEAVE TO FILE FURTHER MOTIONS.

on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

**David Peterson, Counsel for Defendant Torres-Hernandez;  
Mahir Sharif, Counsel for Defendant Merino-Calvero; and  
Gayle Mayfield, Counsel for the Material Witnesses**

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 9, 2008.

s/ Luella M. Caldito

LUELLA M. CALDITO